Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 23 JUNE 7, 1989 No. 23

This issue contains:

U.S. Customs Service
C.S.D. 88–49

U.S. Court of Appeals for the Federal Circuit
Appeal No. 88–1259 and 88–1260; and
89–1023 and 89–1042

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 23, 1989.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the Customs Bulletin," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 88–49)

Abstracts of Unpublished Customs Service Decisions

COMMODITY CLASSIFICATION

C.S.D. 89–49(1)—*Commodity:* Dam material. Irrigation fabric laminated on both sides with plastics and hemmed along one edge. *Classification:* The material is classifiable under the subheading for other articles of plastics, in 3926.90.9050, HTSUSA. *Document:* Hqs. ruling letter 083013, dated March 20, 1989.

C.S.D. 89–49(2)—*Commodity:* Diesel fuel injectors exported for repairs constituting remanufacture are eligible for the partial duty exemption under HTSUSA subheading 9802.00.50. However, only those constituent parts that go through the repair process as a matched set to represent the essential identity of the exported article are entitled to the exemption; all other components, i.e., new and commingled replacement parts of other fuel injectors, are part of the cost or value of the repairs. Replacement of matched set components renders the otherwise eligible article ineligible, as the identity of the exported article is destroyed and

results in a new and different article. *Document:* Hqs. ruling letter 554731, dated February 2, 1989.

C.S.D. 89–49(3)—*Commodity:* Gasoline blendstock. Crude petroleum will be processed in a beneficiary country into gasoline blendstock through a full-scale distillation and refining process. The gasoline will then be blended in a beneficiary country with ethanol in certain proportions to establish a mixture containing no more than 89 percent gasoline and no less than 11 percent ethanol. *Valuation:* (1) Only the direct costs of processing the gasoline blendstock are attributable to the 35 percent requirement, since that blendstock is not further substantially transformed by the described blending with ethanol. (19 CFR 10.196(a)(2) and 195(a)(2). (2) The allowable direct costs of processing need not be incurred by a single, or the final, beneficiary country manufacturer. (3) The importer is responsible for securing (and substantiating, if necessary) information for all costs or values attributed to the 35 percent requirement. *Document:* Hqs. ruling letter 544271, dated February 21, 1989.

C.S.D. 89–49(4)—*Commodity:* Gloves. Ladies' dress gloves composed of acrylic knit fabric with a full overlaid leather back and a leather bow on the back. Overlaid leather strips also appear on the thumb, forefinger and part of the palm. *Classification:* The gloves are classified under subheading 6116.93.2010, HTSUSA, which provides for gloves, mittens and mits, knitted or crocheted, of synthetic fibers, other, without fourchettes, textile category 631. *Document:* Hqs. ruling letter 082149, dated March 20, 1989.

C.S.D. 89–49(5)—*Commodity:* Containers. Steel sheets are to be exported from the U.S. to Mexico where they will be sheared to size and bent, notched or drilled to form component container parts. These components will then be welded together to form the completed containers. *Classification:* In the manufacturing of steel storage and trash containers, the shearing, bending, notching and drilling is a substantial transformation. The resulting container parts undergo a second substantial transformation when they are assembled into the final product, entitling the containers to GSP treatment. *Document:* Hqs. ruling letter 555111, dated March 14, 1989.

C.S.D. 89–49(6)—*Commodity:* Ophthalmic plastic lenses. During the manufacturing process in Mexico, two U.S. origin chemicals are reacted to form a polymerized mixture termed an initiated concentrate. *Classification:* In the manufacture of ophthalmic lenses, polymerization of two U.S. origin chemicals abroad is a substantial transformation. The resulting initiated concentrate is then processed into ophthalmic lenses, which is a second substantial transformation and entitles the lenses to GSP treatment. *Document:* Hqs. ruling letter 555060, dated March 20, 1989.

C.S.D. 89–49(7)—*Commodity:* Jacket/skirt. A women's jacket and skirt made of 100 percent woven rayon, twill weave construction. The skirt and the jacket have a harringbone pattern, the jacket also has a check or plaid pattern, and both items are of different colors. *Classification:* The women's jacket and skirt do not constitute a suit under the HTSUSA because they are not identical in color and style. The jacket is classifiable in subheading 6204.39.3010, HTSUSA, and the skirt is classifiable in subheading 6204.59.3010, HTSUSA. *Document:* Hqs. ruling letter 081487, dated March 2, 1989.

C.S.D. 89–49(8)—*Commodity:* Liquid food. The liquid nutritional food products are to be taken by medical patients with impaired nutritional status and are administered orally or by a feeding tube. *Classification:* The liquid nutrition food products are classifiable in subheading 2106.90.60, HTSUSA, as food preparations not elsewhere specified or included. *Document:* Hqs. ruling letter 082193, dated February 2, 1989.

C.S.D. 89–49(9)—*Commodity:* Mugs. Glass mugs made in the U.S are exported to France where they are etched or cut and also specifically tempered. *Classification:* The processing in France by etching and special tempering amounts to such substantial changes in the imported merchandise as to preclude tariff treatment as merely altered articles under subheading 9802.00.50, HTSUSA. *Document:* Hqs. ruling letter 555250, dated March 13, 1989.

C.S.D. 89–49(10)—*Commodity:* Waferboard (particle board) manufactured in Canadian mills. Protest review decision concerning the liquidation of various entries made by a lumber distributor. The distributor sold the merchandise to a U.S. purchaser who is a party related to the distributor under section 402(g) of the TAA. *Valuation:* Transaction value is the proper method of appraisement in the entries where the price actually paid or payable closely approximates the test values. In those cases, the transaction value is the price that the U.S. customer paid the distributor for the merchandise. Transaction value is an unacceptable method of appraisement in the entries where the price actually paid or payable did not closely approximate the test values. In those entries, the proper method of appraisement is under section 402(c). The appraisements should be based on previously accepted transaction values for sales between another U.S. purchaser and an unrelated distributor for identical or similar merchandise. The protest should be denied. *Document:* Hqs. ruling letter 544292, dated February 21, 1989.

C.S.D. 89–49(11)—*Commodity:* Waferboard (particle board) manufactured in Canadian mills. Protest review decision concerning the liquidation of various entries made by a lumber distributor. Appraisement of waferboard under sections 402(b) and 402(f) of the

TAA. *Valuation:* (1) Transaction value is the proper appraisement method for the entries that contain the distributor's invoice to its U.S. customer. (2) The sale between the distributor and its U.S. customer is the sale that directly caused the merchandise to be exported from Canada to the U.S. The amount of that sale is the price actually paid or payable for the goods under transaction value. The protest should be denied. *Document:* Hqs. ruling letter 544283, dated February 23, 1989.

C.S.D. 89–49(12)—*Commodity:* Waferboard (particle board) manufactured in Canadian mills. Protest review decision concerning the liquidation of various entries made by a lumber distributor. *Valuation:* Based on evidence in this case, the distributor sold the merchandise from the storage-reload center to U.S. buyers for export to the U.S. The protest should be denied and the merchandise appraised under transaction value using the amount the U.S. customer paid to the distributor as the price actually paid or payable. *Document:* Hqs. ruling letter 544280, dated February 2, 1989.

C.S.D. 89–49(13)—*Commodity:* Sleepwear, Ladies' sleepwear to be assembled abroad from U.S. components will have a crest, i.e., logotype, applied to the front of the garment. During the assembly operation, the crest will be placed on the garment by means of a heat-screen transfer process. The U.S.-manufactured screen consists of a large sheets of paper upon which special inks and colors are superimposed by curling in an oven. The cured sheets of paper are exported and then pressed onto the fabric by a heat press machine at 370–400 degrees minimum heat at a pressure of 40–80 pounds per square inch for 5–7 seconds, after which the paper is peeled and the screen is transferred onto the fabric. *Classification:* The heat transfer operation affixing the crest to the ladies' sleepwear constitutes an acceptable assembly operation for purposes of HTSUSA subheading 9802.00.80. Allowances in duty may be made under this tariff provision for the cost or value of the inked crest and other U.S. fabricated components that are to be assembled abroad into the ladies' sleepwear, upon compliance with the applicable Customs Regulations (19 CFR 10.11–10.24). *Document:* Hqs. ruling letter 555175, dated March 13, 1989.

C.S.D. 89–49(14)—*Commodity:* Steel coil. Hot-rolled steel coil of U.S. origin will be exported to be cut and slit into blanks which will then be cold roll-formed into steel C-channel beams denominated "purlins." The black purlins will then be returned to the U.S. where they will be painted with a red oxide and two holes will be punched at each end to facilitate the incorporation of the purlins into metal buildings. Individual purlins will be cut and perforated by the ultimate U.S. purchaser after sale. *Classification:* Hot-rolled steel coil of U.S. origin, exported for cutting, slitting

and cold roll-forming into C-channel beams denominated "purlins," then returned to the U.S. for hole-punching operations, meets the dual "further processing" requirement imposed by HTSUS subheading 9802.00.60, and qualifies the article of metal for the partial duty exemption available under this tariff provision. *Document:* Hqs. ruling letter 554967, dated February 21, 1989.

C.S.D. 89–49(15)—*Commodity:* Steel, sheet steel in coils. Semi-finished steel slabs enter Canada where they are reheated to rolling temperatures of between 2100 to 2300 degrees F and held there for approximately 2-1/2 hours. The slabs are then rolled to an intermediate thickness in a process called roughing. In this process, horizontal rolls reduce thickness between .8 inch to 1.6 inches, and vertical rolls reduce width up to 2 inches. The length is drastically increased. The product is then trimmed on both ends and finished rolled at a temperature of 1600 degrees F to final thickness, after which it is water cooled, then coiled. *Country of Origin:* The processing operations in Canada result in a product that is substantially transformed there, one having a new name, character and use. The articles entering the Customs territory are products of Canada for Customs purposes. *Document:* Hqs. ruling letter 081659, dated March 3, 1989.

C.S.D. 89–49(16)—*Commodity:* Steel pipe. Abrasion resistant steel pipe for use in hydraulic slurry and pneumatic conveyance systems. The country of origin of steel pipe from the U.K. which is induction heated and water quenched in Canada to form abrasion resistant steel pipe. *Classification:* The heat treatment process described in the instant case results in a new and different article which is considered a product of Canada for tariff purposes. *Document:* Hqs. ruling letter 082183, dated March 3, 1989.

C.S.D. 89–49(17)—*Commodity:* Sweaters with Gore-Tex linings. The garments submitted include a crew neck sweater with a wool outershell and a Gore-Tex stretch lining, a cardigan composed of a wool outershell and a Gore-Tex stretch lining, and a crew neck sweater with a man-made fiber outer shell and a Gore-Tex stretch lining. The Gore-Tex stretch linings consist of a sheet of expanded polytetrafluoroethylene (PTFE) material, a plastic, laminated to an "oatmeal" knit fabric. *Classification:* The sweaters are classifiable under subheading 6113.00.0090, HTSUSA, as other garments, other than of cotton, women's. *Document:* Hqs. ruling letter 082056, dated January 30, 1989.

C.S.D. 89–49(18)—*Commodity:* Sweaters. The country of origin of sweaters made from piece goods. In South Korea, Taiwan, or China, yarn will be knit on flat or circular knitting machines into continuous lengths of piece goods of four different specifications. The piece goods are so made that the pulling of threads will result in their separating into distinct panels that will be used to

make sweater fronts or backs, sleeves, neck ribbing, or armhole ribbing, depending on the specifications. In the second country or territory, the piece goods will be separated into panels. Shoulder, neckline, armhole, and sleeve cap edges will be shaped by cutting. Seams will be joined, and the finished sweaters will be inspected, pressed, and boxed. *Classification:* The sweaters will be products of South Korea, Taiwan, or China, wherever the panels are knit. *Document:* Hqs. ruling letter 082369, dated January 24, 1989.

C.S.D. 89–49(19)—*Commodity:* Toiletry bags. Ladies toiletry bags, one measuring 10.5 inches by 4 inches and the other 9 inches by 12.5 inches. The bags contain plastic accessories such as a soap dish, lotion bottle, jar, toothbrush case, and a removable transparent plastic pencil-like pouch. *Classification:* Toiletry bags containing soap dishes, lotion bottles, toothbrush cases, etc., are classifiable under subheading 9605.00.0000, HTSUSA, as travel sets for personal toilet, sewing or shoe or clothes cleaning. *Document:* Hqs. ruling letter 081471, dated January 24, 1989.

C.S.D. 89–49(20)—*Commodity:* Trousers and belts. Women's trousers with four loops carrying a nontextile belt. No information is provided as to the country of origin or the composite materials of either trousers or belts. The belts will be produced in the Dominican Republic. *Classification:* The trousers and belts are classified under heading 6204, HTSUSA, a provision including women's trousers of textile materials, not knitted or crocheted; the exact subheading and textile category will depend on the textile material of which the trousers are in chief weight. The trousers and belts are classified as sets. *Document:* Hqs. ruling letter 083316, dated March 6, 1989.

C.S.D. 89–49(21)—*Commodity:* Payments made to Foreign Quasi-Governmental Organization. The dutiability of payments made by an importer to a foreign quasi-governmental organization that advises American importers on the sourcing of products in the PRC. The services provided by the organization are (1) Economic analyses of market conditions in the PRC; (2) Assistance in locating supply sources; and (3) Advice on the availability of merchandise for shipment to the U.S. *Valuation:* The importer's payments to the foreign quasi-governmental organization are not dutiable under transaction value. *Document:* Hqs. ruling letter 544264, dated February 24, 1989.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 88–1259 and 88–1260)

ZENITH ELECTRONICS CORP., INDEPENDENT RADIONIC WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL–CIO–CLC, PLAINTIFFS-APPELLEES *v.* UNITED STATES, DEFENDANT-APPELLANT, SANYO ELECTRIC CO., LTD., VICTOR CO. OF JAPAN, LTD., US JVC CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., PANASONIC CO. AND QUASAR CO., A DIVISION OF MATSUSHITA ELECTRIC CORP. OF AMERICA, INC., PANASONIC HAWAII, INC., AND PANASONIC SALES CO., A DIVISION OF MATSUSHITA ELECTRIC CORP. OF PUERTO RICO, INC., GENERAL CORP. OF JAPAN, MITSUBISHI ELECTRIC CORP., MITSUBISHI ELECTRIC SALES AMERICA, INC., NEC CORP. AND NEC HOME ELECTRONICS (U.S.A.) INC., DEFENDANTS

Frederick L. Ikenson, of Frederick L. Ikenson, P.C., of Washington, D.C., argued for plaintiffs-appellees. With him on the brief was *J. Eric Nissley*. *Paul D. Cullen* and *Patrick B. Fazzone*, Collier, Shannon, Rill & Scott, of Washington, D.C., were on the brief for plaintiffs-appellees The Independent Radionic Workers, et al.

John D. McInerney, Department of Commerce, of Washington, D.C., argued for defendent-appellant. With him on the brief were *Robert H. Brumley*, General Counsel and *M. Jean Anderson*, Chief Counsel for International Trade. Also on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrences*, Department of Justice, of Washington, D.C.

Sukhan Kim, *Thomas B. Wilner* and *Jeffrey M. Winton*, Arnold & Porter, of Washington, D.C., were on the brief for Amicus Curiae Samsung Electronics Co., Ltd. & Samsung Electronics America, Inc.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before ARCHER, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MICHEL, *Circuit Judge.*

ORDER

This appeal is from the judgment of the United States Court of International Trade dated January 14, 1988 (*Zenith II*). The United States seeks review of that court's Opinion and Order dated April 24, 1986, *Zenith Electric Corp.* v. *United States, et al.*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986) (*Zenith I*), which reversed the final determination of the International Trade Administration, Department of Commerce (Department), in an administrative review under 19 U.S.C. § 1675(a) (1982 and Supp. II 1984), 50 Fed. Reg. 24,278 (1985), of an antidumping order, T.D. 71–76, *Television Receiving Sets, Monochrome and Color, from Japan*, 36 Fed. Reg. 4597 (Dep't Comm. 1971), and remanded the case to the Department for redetermination.

BACKGROUND

In accordance with the antidumping laws in effect in 1982, after an affirmative determination of antidumping duties, the International Trade Administration (ITA) was required annually to redetermine the amount of the duty, i.e., the margin by which the foreign market value of merchandise subject to the antidumping order exceeds the United States price. 19 U.S.C. § 1675(a) (1982).* Various adjustments are made to the U.S. price before the adjusted U.S. price is subtracted from foreign market value. One of these adjustments was disputed in this case:

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but *only to the extent* that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; * * *

19 U.S.C. § 1677a(d)(1)(C) (1982) (emphasis added).

Although the Department had admitted in other, earlier determinations that the "addition to section 772(d)(1)(C) of the 'but to the extent' language, intended that [the Department] measure absorption and limit the addition to the tax passed through," *Color Television Receivers from Korea*, 49 Fed. Reg. 7620, 7624 (Dep't Comm. 1984) (final determination of sales at less than fair value), it further stated that because of "informational difficulties," *id.*, "it [was] impossible to do so." *Id.* Under these circumstances, the Department presumed a full pass-through. *Id. See also Color Television Receivers from Taiwan*, 49 Fed. Reg. 7628, 7632 (Dep't Comm. 1984) (final determination of sales at less than fair value).

---

*19 U.S.C. § 1675(a)(1) has since been amended so that reviews are done only upon request. (Supp. V 1987)

In this determination, *Television Receiving Sets, Monochrome and Color, from Japan*, 50 Fed. Reg. 24,278, 24,279 (Dep't Comm. 1985) (final admin. review), the Department rejected Zenith's and the three domestic unions' proposed method for measurement of the pass-through. The Department stated that "[a]bsent evidence that clearly demonstrates that a manufacturer's commodity tax cost is not reflected in the home market sales prices, the Department may reasonably conclude that cost and price are directly related." *Id.* The Department assumed that 100% of the rebated Japanese commodity tax had been passed through stating "[t]o date, the Department has not developed a reasonable method for isolating the cost-price relationship for individual adjustments." *Id.* In response, Zenith and the unions filed an action in the Court of International Trade contending that tax incidence must be measured and that a full pass-through may not be assumed. In *Zenith I*, 633 F. Supp. 1382 (1986), the court reversed the Department's determination and remanded the case for a calculation of the actual amount of the pass-through and a redetermination of duties in accordance with the court's decision. While the court said the Department had the discretion to choose the method of measurement, it also stated that "the ITA may not place the burden on a private party to advance a method of measuring tax absorption which the ITA deems acceptable, in failure of which it performs no measurement whatsoever." *Zenith I*, 633 F. Supp. at 1400. The Department, upon using an econometric model for calculation, concluded that, as originally assumed, 100% of the tax was passed through. In *Zenith II*, the Court of International Trade entered judgment, dated January 14, 1988, affirming the Department's dumping determination.

The government now seeks to overturn the April 24, 1986 remand order by the Court of International Trade in *Zenith I*, requiring the Department to measure tax pass-through to consumers in the home market, by appealing from the January 14, 1988 judgment in *Zenith II*, affirming its antidumping duty determination based on the recalculation.

DISCUSSION

Appellate courts are not in business to issue advisory opinions. Generally, a party has a statutory right to appeal from a judgment only when it has been aggrieved by the judgment, *Deposit Guaranty National Bank of Jackson, Mississippi* v. *Roper*, 445 U.S. 326, 333 (1980). But "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III," *id.* at 334. Because its determination was affirmed, the government has not been aggrieved by the judgment of the Court of International Trade on January 14, 1988.

The adverse ruling that the government in actuality protests is the April 24, 1986 order by the Court of International Trade requiring the Department to calculate the amount of the pass-through. The question is whether, though prevailing, the government retains a stake in the question it appeals, satisfying the requirements of Article III. Since the pass-through in this case is the same—100%—whether assumed or calculated, the government has no stake in the legality of the April 24, 1986 order. With or without that order, the government's antidumping determination stands. Hence, the case or controversy requirement of Article III is not met.

Accordingly,

IT IS ORDERED THAT:

The government's appeal of the Court of International Trade's January 14, 1988 judgment is dismissed.

Dated: May 11, 1989.

FOR THE COURT,
PAUL R. MICHEL,
Circuit Judge.

(Appeal No. 89–1023 and 89–1042)

SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS OF AMERICA, INC. AND SAMSUNG INTERNATIONAL, INC., AND GOLDSTAR CO., LTD., GOLDSTAR ELECTRONICS INTERNATIONAL, INC. AND GOLDSTAR OF AMERICA, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, MALCOLM T. BALDRIGE, SECRETARY OF COMMERCE, BRUCE SMART, UNDER SECRETARY OF COMMERCE, PAUL FREEDENBERG, ASSISTANT SECRETARY FOR TRADE ADMINISTRATION, GILBERT B. KAPLAN, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, U.S. CUSTOMS SERVICE AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS-APPELLEES, ZENITH ELECTRONICS CORP., DEFENDANT-APPELLEE, INDEPENDENT RADIONIC WORKERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL–CIO AND INDUSTRIAL UNION DEPARTMENT, DEFENDANTS-APPELLEES

Michael P. House, Dow, Lohnes & Albertson, of Washington, D.C., argued for plaintiffs-appellants Goldstar Co., Ltd., et al. With him on the brief were *William Silverman* and *R. Will Planert. Sukhan Kim, Thomas B. Wilner* and *Jeffrey M. Winton,* Arnold & Porter, of Washington, D.C., were on the brief for plaintiffs-appellants Samsung Electronics Co., Ltd., et al.

Elizabeth C. Seastrum, Department of Justice, of Washington, D.C., argued for defendants-appellees. With her on the brief were *John R. Bolton,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Michael A. Levitt,* Acting General Counsel, *Stephen J. Powell,* Chief Counsel and *Mark J. Sadoff,* Attorney-Advisor, U.S. Department of Commerce, of counsel. *Larry Hampel,* of Frederick L. Ikenson, P.C., Washington, D.C., argued for defendant-appellee Zenith Electronics

Corp. With him on the brief were *Frederick L. Ikenson* and *J. Eric Nissley. Paul D. Cullen* and *Laurence J. Lasoff*, Collier, Skannon, Rill & Scott, of Washington, D.C., were on the brief for defendants-appellees Independent Radionic Workers of America, et al.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

(Decided May 10, 1989)

Before RICH, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and MAYER, *Circuit Judge*.

PER CURIAM.

DECISION

The judgment of the United States Court of International Trade, 692 F. Supp. 1382 (1988), upholding the determination of the Department of Commerce that separately imported color picture tubes and printed circuit boards, when subsequently assembled together, are within the scope of the antidumping duty order covering complete and incomplete color television receivers from Korea, 49 Fed. Reg. 18,336 (Dep't Comm. 1984), is affirmed.

OPINION

Appellants Samsung and Goldstar raise an issue on appeal that was not expressly covered in the trial court's opinion. We address it here; on all other issues we affirm on the basis of the court's opinion, which we adopt.

Appellants assert that Commerce defined the scope of its antidumping duty order by reference to specific tariff classifications. Pointing out that the classifications under which color picture tubes and printed circuit boards are dutiable are not among those enumerated, appellants argue that they are not, therefore, properly within the scope of the order.

We have no reason to believe that Commerce did not intend to include items dutiable under the specified classifications within the scope of the order. Contrary to appellants' contention, however, we likewise have no reason to believe Commerce intended to limit the order to those items. Indeed, Commerce could not have been clearer that its intention was precisely the opposite: "This investigation is intended to cover all color television receivers regardless of tariff classifications." 49 Fed. Reg. at 18,337. In any event, it is eminently reasonable for Commerce to omit the separate classifications of tubes and boards: all parties agree that, when unassembled, these items do not constitute "color television receivers, complete or incomplete." *Id.*

All parties also agree that, "when assembled," ITC Final Determination at 3–4, tubes and boards do constitute imcomplete receivers. Appellants would have us read "when assembled" as "when imported assembled," or at least "when covered on the same import entry," thus confining the temporal ambit of the word "when" to the moment of importation. But this construction artificially restricts the plain meaning. In classification cases a higher duty can be imposed where the importer's intention is to combine two separate components, after importation, to make an article that is classified at the higher duty. *See Isaacs* v. *Jonas*, 148 U.S. 648, 653 (1892). The rule is that "[w]hen it is found that the article imported is in fact the article described in a particular paragraph of the tariff act," separate packaging of parts of the article "to avoid the specified duty on the article as a whole," "is simply a fraud on the revenue and cannot be permitted to succeed." *United States* v. *Citroen*, 223 U.S. 407, 415, 416 (1912). We see no reason for a different rule here.

AFFIRMED

NICHOLS, *Senior Circuit Judge*, dissenting.

Respectfully, I dissent. The result-oriented court decision may be less favored now than a few years ago, but doubtless never will become extinct. It is a temptation to which all of us must occasionally yield unless someone obnoxiously takes on himself the role of little boy in the "emperor has no clothes" fable.

What is happening I shall briefly state, and then continue with the law. In 1983, the Department of Commerce, on complaint of various unions, and upon reviewing their petition, initiated an antidumping investigation, after which it found reasonable ground to believe that color television receivers from Korea were being sold in the United States at less than fair value. It specified what was being sold: "color television receivers complete or incomplete" and under what tariff paragraphs they were classified. There is administrative precedent on what an "incomplete" receiver is. Unfortunately, Commerce failed to specify certain important component parts, when imported separately for later incorporation in this country into complete receivers: "color picture tubes" (CPT) and "printed circuit boards" (PCB). They are "incomplete" receivers only if joined together; all agree as to that. There was then, and has been since, a substantial import trade in these important components. They are classified *eo nomine* under Tariff Schedules of the United States (TSUS) items 687.35 (CPT) and 685.1564 (PCB). Through somebody's blunder, these items were left out when the Commerce Department specified the TSUS classification numbers of the sets and components that were subjects of the investigation under 19 U.S.C. § 1673a(c)(2). By the later-strained effort to correct the mistake, I

gather it is very serious and undercuts the effect the proceeding has had, or was hoped to have, on color televisions imported complete, or incomplete, or in parts, from Korea, at less than fair value. The motivation for a result-oriented decision is great. It is not denied that 1986 would have been too late to amend the decision to add items initially left out and not included in the investigation. At any rate, after repeatedly making noises that seemed to exclude CPT's and PCB's from the investigation, if imported separately, the Commerce Department, in 1986, reversed its field and attempted to make it appear in a "Scope Clarification Order" that CPT's and PCB's have been intended and were covered all along, at least when used in this country in the manufacture of new sets and not for repair or replacement. The Court of International Trade has put on its blinders and cannot perceive the manifest illegality of enlarging the scope of the proceeding in this drastic manner, and now we have joined the club.

There can be no doubt that the Koreans import CPT's and PCB's in entries separate from other components and from each other so as to distance them, legally, from the complete and incomplete television receivers which are the subjects of the proceeding, but there is no suggestion that this is evasion rather than avoidance of dumping duty. Until now there has been no challenge to the proposition that an importer enjoys the privilege of fashioning and packaging his goods for import in the form and manner that, absent deception, will obtain for him the most favorable tariff treatment. *United States* v. *Citroen*, 223 U.S. 407 (1912). By TSUS General Headnote 10 (ij)—

> A provision for "parts" of an article covers a product chiefly used as a part of such article, but does not prevail over a specific provision for such part.

There can be no doubt, therefore, that CPT's and PCB's are dutiable under 687.35 and 685.1564, respectively. 687.35 reads:

> Television Picture Tubes
>
> Color * * *
> Other * * *

685.1564 reads:

> Not having a picture tube:
>
> Printed circuit boards * * *.

And by *United States* v. *Citroen*, what is meant to be done with them after importation does not matter.

It is equally clear the term "incomplete receiver" must embrace in an importation both a CPT and a PCB. See Part 5, statistical headnote 8.

The Commerce Department's Final Determination notice of March 1984, 49 Fed. Reg. 7620, 7621, lists the scope of the determination. It reads:

> The merchandise covered by this investigation is color television receivers, complete or incomplete. This investigation is intended to cover all color television receivers regardless of tariff classifications. [But nothing said about parts.] The merchandise is currently classifiable under [listing 13 TSUS items, none of them 687.35 or 685.15 with 64 or any other subhead].

The Court of International Trade relied on the fact the CPT's and the PCB's were going to be combined at some date after importation, but under the *Citroen* doctrine that fact does not matter.

Actually the Court of International Trade and its defenders among the parties rely, expressly or *sub silentio*, on some supposed rule that Commerce may make its own tariff classification for antidumping cases and is not required to use those devised for conventional duty cases. I do not doubt that Commerce could devise its own language if it wished, and if it made itself understood it would not matter if it deviated from conventional tariff classification rules. But it did not choose to do so. It saw fit to identify what its decision covered by reference to TSUS items, the standard nomenclature of conventional tariff classification. Why? For the obvious reason it wanted customs officials to know on what entries to suspend liquidations. If you speak a sentence in French, you must expect to be understood as a Frenchman in Paris would be. It is no time to introduce words given your own subjective meaning on the *Alice in Wonderland* model.

Just as there was no notice that CPT's and PCB's imported separately were included in the investigation and resultant determination, so also there was none that the classification of CPT's and PCB's as in or out of the case was to be made according to their end use in the United States. This was contrary to the usual customs rule, *United States* v. *Citroen, supra*, and if it was to be done, notice should have been given. We are referred to no provision of statute, regulation, or case law, making such a result automatic.

I would never represent that the former customs courts were impeccable in their approach to customs law, but one fault they avoided. They did not indulge in result-oriented jurisprudence. If they erred in that regard, it was in the opposite direction. At times importers, especially in pre-TSUS days, were "stuck" with duties far higher than they had anticipated, because of some overlooked aspect of the merchandise that was economically unimportant but controlled its tariff classification and rate of duty. On the other hand, importers occasionally discovered some loophole to avoid high duties intended to apply to their products, by altering them in some respect, insignificant except for its tariff effect. This state of uncertainty was considered to be a "nontariff barrier." In both cases, courts exhibited a fine disregard for the benefit or ill their interpre-

tations caused the body politic. TSUS attempted to, and largely succeeded in, correcting this by taking tariff classification away from the courts with an enormous list of *eo nomine* classifications that could not be ignored: at least, could not be until now. To say that an *eo nomine* classification of a part can be ignored, and the part, because of its end use treated as the whole, unfinished, is a shattering blow to post-TSUS jurisprudence, and its effort to remove "nontariff barriers."

Customs law has ceased to be a matter of domestic interest only, as Congress so disastrously treated it in 1930, with the odious Smoot-Hawley Tariff of that year. It is a matter of international concern. This is particularly true of antidumping and countervailing duties. They have long been matters dealt with in the GATT, and it has been difficult to reconcile our, at times, drastic laws with internationally recognized standards of fair dealing. Congress has undertaken to master this problem in part by codifying procedures other countries can notice and rely on, and in part by "judicializing" the process so that procedural, as well as substantive, rights can be recognized and enforced in courts.

It was doubtless a mistake to omit CPT's and PCB's, imported separately, from the 1983 proceeding respecting Korean color televisions. It was, mistake or not, a decision businessmen must have relied on in making business decisions, and Commerce must live with it. It is a worse mistake, especially in light of the background, to impute to the original authors of the investigation an intent they never expressed until 1986, and then in order to correct the mistake they made in 1983. Result-oriented jurisprudence could not find a worse place in which to raise its head.

Superintendent of Documents Pu

Order Processing Code:
* 6649

☐ **YES,** please send me the following indicated publicat

1. The total cost of my order is $_____ (International customers
domestic postage and handling and are good through 12/89. Afte
202-783-3238 to verify prices.

Please Type or Print

2. _____
(Company or personal name)

_____
(Additional address/attention line)

_____
(Street address)

_____
(City, State, ZIP Code)

(_____)_____
(Daytime phone including area code)

3. P
☐
☐
☐
☐
(
(S

4. **Mail To:** Superintendent of Documents, Government Printing Offic

ublication Order Form

Charge your order. It's easy!

tions:

please add an additional 25%.) All prices include regular
er this date, please call Order and Information Desk at

Please choose method of payment:

- ☐ Check payable to the Superintendent of Documents
- ☐ GPO Deposit Account ☐☐☐☐☐☐-☐
- ☐ VISA, CHOICE or MasterCard Account

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

(Credit card expiration date)

Thank you for your order!

(Signature)

6/89

ce, Washington, D.C. 20402-9325

Index

Customs Bulletin and Decisions
Vol. 23, No. 23, June 7, 1989

U.S. Customs Service

Customs Service Decisions

Abstracts of Unpublished Customs Service Decisions

U.S. Court of Appeals for the Federal Circuit

ORDERING OF BOUND VOLUMES

Bound volumes of material originally published in the weekly CUSTOMS BULLENTIN may be purchased from the Superintendent of Documents, U.S. Government Printing Office. Complete the order form supplied herewith and forward with correct payment directly to: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402–9326.

Recently published bound volumes are noted below:

CUSTOMS BULLETIN, Bound Volume No. 21, January–December 1987; Supt. Docs. Stock No. 048–000–00403–2; Cost: $19 domestic, $23.75 foreign.

*U.S. G.P.O. 1989-241-040:80043